Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 76-1706

ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES, et al.,
Respondents,

v.

THE DEPARTMENT OF REVENUE OF THE STATE OF WASHINGTON,
Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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QUESTIONS PRESENTED

1. Is the decision below, which is based on decisions of this Court that are squarely in point, a correct decision?

2. Does a regulation of petitioner that exempts from tax "transportation of persons or property across state boundaries" provide an adequate factual base for petitioner's request that this Court "clarify" state power to tax those very activities?

RESPONDENTS' STATEMENT OF THE CASE

Promptly after enacting its doing-business privilege tax in 1935, petitioner ("the State") attempted to apply it to stevedoring activities in interstate and foreign commerce. Stevedoring activities were expressly made taxable in a regulation. The State's attempt was struck down by this Court in Puget Sound Stevedoring Co. v. Tax Commission, 302 U.S. 90 (1937). (Petitioner's Brief for Certiorari at 26, Appendix E, ¶ IV). Ten years after Puget Sound, this Court followed that case in Joseph v. Carter & Weekes Co., 330 U.S. 422 (1947), another stevedoring case involving a privilege tax indistinguishable from the Washington tax. Both the Import-Export Clause and the Commerce Clause were invoked.

For 37 years, succeeding editions of the State's regulation acquiesced in Puget Sound. In 1974, however, an amended regulation reasserted the tax against stevedoring activities conceded to be identical to those protected by Puget Sound. (Petitioner's Brief for Certiorari at 3, n. 5). Puget Sound defined the protected activities as: "Unloading vessels by moving the cargo from ship's hold to 'first place of rest' on the dock; and loading vessels by moving the cargo from place of rest to ship's hold." 302 U.S. at 93. This

Court considered the stevedores as an arm of the foreign and interstate carrier -- doing work (historically done by the ship's crew) that is an integral part of foreign and interstate ocean transportation.

REASONS WHY PETITION SHOULD NOT BE GRANTED

I. The Decision Below Was Correct

The court below followed a settled rule twice established by this Court in stevedoring decisions that are squarely in point. Puget Sound Stevedoring Co. v. Tax Commission, supra, and Joseph v. Carter & Weekes Co., supra. See also Michigan-Wisconsin Pipeline Co. v. Calvert, 347 U.S. 157 (1954), which is indistinguishable in principle. The State asks this Court to consider precisely the narrow issue decided in those cases yet a third time. This Court, in Puget Sound, treated the stevedores as an arm of the foreign and interstate ocean carriers and in so doing was consistent with maritime common law,[1] federal statutes[2] and international

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[1] "'[I]t is as much the duty of the shipowner to load and discharge the cargo as it is to carry it between the loading and discharging ports.'" Union Marine & Gen. Ins. Co. v. American Export Lines, Inc., 274 F. Supp. 123, 128 (S.D.N.Y.

agreements[3] governing the carriage of goods by sea. Any other rule would permit every state (and each political subdivision) controlling a seaport to effectively impose duties on international trade (because, although the excise may be imposed on the stevedore, his role as arm of the carrier means the tax will be passed on to the shipper as an item of overhead).

1966), quoting Munson S.S. Line v. Glasgow Nav. Co., 235 F. 64 (2d Cir. 1916), cert. denied, 243 U.S. 643 (1917), appeal dismissed, 246 U.S. 647 (1918). See also Ex parte Easton, 95 U.S. 68, 75-76 (1877); The Eddy, 72 U.S. (5 Wall.) 481, 495 (1867); Calcot, Ltd. v. Isbrandtson Co., 318 F.2d 669, 673 (1st Cir. 1963); American President Lines, Ltd. v. Federal Maritime Bd., 317 F.2d 887, 888 (D.C. Cir. 1962).

[2] The Carriage of Goods by Sea Act, 46 U.S.C. § 1303 (1970), governing foreign commerce, defining carrier responsibility (and liability) provides in pertinent part:

> "(2) The carrier shall properly and faithfully load, handle, stow, carry, keep, care for, and discharge the goods carried."

Accord, the Harter Act, 46 U.S.C. § 190 (1970), governing interstate and foreign maritime commerce.

[3] Convention for the Unification of Certain Rules Relating to Bills of Lading for the Carriage of Goods by Sea, June 23, 1925, 51 Stat. 233 (1937), T.S. No. 931, art. 3, §§ 2 & 8.

II. The Cases Relied Upon by the State Are Not In Point

The State relies on Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976), and Complete Auto Transit, Inc. v. Brady, 97 S. Ct. 1076 (1977).

Michelin involved a property tax, not an excise. It held that after the completion of import, tires which the importer continued to hold were subject to a property tax. (Previously goods were protected from property taxes as long as the importer held them in the "original package.")

Michelin says nothing at all about exporting and, even as to importing, Michelin's impact occurred after completion of the transit. This Court, in distinguishing the property tax involved in Michelin from a tax on importing, said: "In effect, the Clause was fashioned to prevent the imposition of exactions which were no more than transit fees . . . ." 423 U.S. at 290. Because stevedoring is a part of the "transit" activity (the cost of which is borne by the shipper), no more effective means of imposing "transit fees" on international trade could be found than an excise on stevedoring.

Complete Auto Transit did not involve the Import-Export Clause. As to the Commerce Clause, it was decided by this Court consistently with

earlier cases involving similar facts.[4] Interstate Oil Pipeline Co. v. Stone, 337 U.S. 662 (1949), and Canton Railroad v. Rogan, 340 U.S. 511 (1951). All three cases held taxable the activities of intrastate carriers -- both termini being within the taxing jurisdiction -- that operated independently of interstate carriers but happened to carry interstate goods. Foreign and interstate carriers were not involved in those cases -- whereas this Court and Congress have recognized that stevedores function as an arm of foreign and interstate carriers.

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[4] Probably the significance that the state sees in Complete Auto Transit is not in its facts, but in some of its language. Because the result of that case accords with established precedent, the language would be dictum were it not that Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951) is declared overruled. The Court might alternatively have distinguished Spector as involving, in substance, a net income tax--ineptly labeled as an excise by the taxing jurisdiction.

III. The Record Below Is Inadequate for the Ambitious Demands That the State Makes Upon This Court

The State has shifted its ground since promulgating the regulation amendment that the court below struck down. The amendment put in issue only stevedoring activities -- a narrow band of commerce only yards wide (from point of rest on the dock to the ship's hold) -- and uniquely bound up with foreign trade, maritime law, and international agreements.

On brief, however, the State urges that this case be used to "complete the process of clarifying the scope of state taxing power which [this Court] commenced in Michelin Tire, supra, and Complete Auto Transit, supra." (Petitioner's Brief for Certiorari at 6).

But the State has not provided the right vehicle. The State's regulation expressly exempts interstate and foreign transport from tax, i.e., "the actual transportation of persons or property across state boundaries is exempt." (Petitioner's Brief for Certiorari at 22, Appendix D). In short, the State has not attempted an exercise of the taxing power that it asks this Court to "clarify." Its amendment did not attempt a tax on foreign and interstate commerce, but aimed only at reclassifying stevedoring as separate and intrastate.

Facts are surely the heart of the judicial craft. A narrow and unique band of sea commerce is not adequate for the broad, general task of "clarifying the scope of state taxing power" under not merely one, but two major clauses of the Constitution (the Import-Export Clause and the Commerce Clause).

Movement is so fundamental to commerce that it has received special protection. Goods moving in commerce are protected from the start of the journey to its end -- as long as there is no unnecessary interruption or delay in journey -- no matter how deeply a state may be penetrated or how many carriers may be involved. Champlain Realty Co. v. Brattleboro, 260 U.S. 366 (1922); Hughes Bros. Timber Co. v. Minnesota, 272 U.S. 469 (1926); Carson Petroleum Co. v. Vial, 279 U.S. 95 (1929); Minnesota v. Blasius, 290 U.S. 1 (1933). Almost as broad as the protection for the goods has been protection from excises on the activity of moving goods (or persons) in commerce. That protection has covered movement of goods between the points where the responsibility of the interstate carrier begins and ends. Michigan-Wisconsin Pipeline Co. v. Calvert, 347 U.S. 157 (1954). (Contrast Complete Auto Transit,

Inc. v. Brady, Interstate Oil Pipeline Co. v. Stone, and Canton Railroad v. Rogan, supra, and like cases involving intrastate carriers providing an independent movement and having both termini within the taxing jurisdiction.) Such protection is over 100 years old, having begun with the Case of the State Freight Tax, 82 U.S. (15 Wall.) 232 (1873), and is supported by numerous cases decided since then.

If all this protection were to be totally and irrevocably swept away, as the State asks, the facts of the case should adequately raise the issues to be decided. A regulation that exempts the very commerce that the State asserts is taxable does not provide the factual base for such monumental judicial pronouncements.

An additional consideration is the nature of the excise. It is the most potent and dangerous weapon in the tax collector's arsenal. It can attach to activities of all kinds. The excise lacks the built-in political restraints that apply to property and income taxes which, if not required to be uniform, at least tend to be general to individuals or corporations that populate the taxing jurisdiction. The versatility of the excise makes it, in practice, virtually

immune to charges of discrimination.[5] A taxing authority's license in selecting subjects and rates for various excises renders a rule against multiple imposition (requiring apportionment)

[5] Washington, for example, has more than a dozen different tax rates for the privilege of doing business ranging from 3.6% of gross income (applicable to railroad, water, light and power distribution, telephone and telegraph) down to a mere .01% (applicable to wholesalers of grains and dried peas). RCW 82.04.230-290. This Court, in Magnano Co. v. Hamilton, 292 U.S. 40 (1933), permitted Washington to tax butter substitutes reasoning that the obvious differences between butter and oleo margarine were enough to support separate tax classifications. Following this Court's lead, the Washington court has explained, "There is no constitutional limitation upon the selection by the legislature of the subjects for excise tax so long as there is any reasonable basis for the classification whatsoever." Gruen v. State Tax Comm'r, 35 Wn.2d 1, 32, 211 P.2d 651, 669 (1949). More recently a tax on the operation of such recreational activities as golf, skating, skiing, pool and billiards has been approved while bowling was exempted. Hemphill v. Tax Comm'n, 65 Wn.2d 889, 400 P.2d 297 (1965). Even in interstate commerce the rule against discrimination has been effective mainly to curb legislation aimed at out-of-state drummers (see, e.g., Robbins v. Shelby County Taxing Dist., 120 U.S. 489 (1887); Nippert v. Richmond, 327 U.S. 416 (1946)); and has not necessarily been effective even for that purpose. See Dunbar-Stanley Studios, Inc. v. Alabama, 393 U.S. 537 (1969), where this Court upheld a tax on transient photographers.

likewise impotent. For these reasons, a hundred years of judicial wisdom has restrained the excise so that one can transport his person or property across this nation by air, highway or rail, through its ports and along its rivers, without the burden of paying a toll to each of the myriad of taxing jurisdictions that sit astride the lanes of commerce.

If other taxing jurisdictions read the language of Complete Auto Transit as petitioner State does, a proper vehicle for testing the scope of that decision will not be long in coming.[6] A

[6] Soon after this Court approved a head tax on interstate airline passengers (on the basis that the proceeds were limited to the development and maintenance of the airport facility involved), Airport Authority v. Delta Airlines, 405 U.S. 707 (1972), a Senate committee identified at least 31 jurisdictions that had rushed to enact various forms of head taxes. S. Rep. No. 12, 93rd Cong., 1st Sess. (1973). See Appendix A. The committee commented:

> " While this decision has invited state and local governments to enact head taxes or fees on air travelers, the court decision does not provide adequate safeguards to prevent undue or discriminatory taxation."

The "toll gate" syndrome will be more than local legislatures can resist if they believe they have an unbridled excise taxing power over the channels of foreign and interstate commerce. In Complete Auto Transit this Court repeatedly voiced its concern for the "practical" or "economic" effects

thoughtful "clarifying of the scope of state taxing power" (assuming it is needed) should await one or more cases with facts that are in the mainstream of the issue as contrasted with the instant case whose unique, narrow facts reflect only the periphery.

CONCLUSION

The decision below was correctly decided based on decisions by this Court that are squarely in point. The cases relied on by petitioner are not in point. The narrow and unique factual base of the instant case is not appropriate to the State's request that this Court clarify a state taxing power that the State has not asserted.

Nor is the State's alternative request for a remand and further consideration by the court below a tenable request. That court followed decisions of this Court conceded to be squarely in point. Because that court's only alternative

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of a state tax. But once having unleashed the excise on movement in commerce, it may be doubted whether this Court can devote the resources to effectively curb unreasonable burdens. Nor are the guidelines that this Court has thus far laid down against discrimination sufficient to enlist the assistance of state courts.

would be to overrule the decisions of this Court (which no lower court could presume to do), there is no useful work to be done on remand.

The petition should be denied.

Respectfully submitted,

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APPENDIX A

AIRPORT PASSENGER TAX

City	Amount	Effective Date	Collecting
1. New Hampshire (on carrier)	$1/$0.50	Aug. 31, 1969	Carrier.
2. Huntsville, Ala.	1.00	July 1, 1972	Airport authority.
3. Philadelphia, Pa.	3.00	——do——	Carrier.
4. Richmond, Va.	1.00	——do——	Do.
5. Sarasota-Bradenton, Fla.	1.00	——do——	Airport authority.
6. Tri-City, Mich.	1.00	——do——	Carrier.
7. Pensacola, Fla.	1.00	Aug. 1, 1972	Do.
8. Kalamazoo, Mich.	1.00	Aug. 15, 1972	Do.
9. LaCrosse, Wis.	1.00	Sept. 1, 1972	Do.
10. Raleigh-Durham, N.C.	2.00	——do——	Airport authority.
11. Allentown, Pa.	$2/1.00	Oct. 1, 1972	Do.
12. Traverse City, Mich.	1.00	——do——	Carrier.
13. Fort Wayne, Ind.	1.00	Oct. 23, 1972	Board of Aviation.
14. Jackson, Miss. (on carrier)	1.00	Nov. 1, 1972	Carrier.
15. Rochester, N.Y.	1.00	——do——	Do.
16. Des Moines, Iowa	1.00	Nov. 6, 1972	Do.
17. Evansville, Ind.	1.00	Nov. 29, 1972	Do.
18. Roanoke, Va.	1.00	Nov. 15, 1972	Do.
19. Fort Myers, Fla.	1.00	Dec. 1, 1972	Airport authority.
20. Duluth, Minn.	1.00	Jan. 1, 1973	Carrier.
21. Newport News, Va.	1.00	——do——	Airport authority.
22. Cedar Rapids, Iowa	1.00	——do——	Do.
23. Madison, Wis.	2.00	Feb. 1, 1973	Carrier.
24. El Dorado, Ark.			
25. Asheville, N.C.	2.00	Jan. 12, 1972	
26. Youngstown, Ohio	1.00		
27. Medford, Oreg.	2.00	Jan. 25, 1973	
28. Eugene, Oreg.	2.00	Feb. 15, 1973	Airport authority.
29. Norfolk, Va.	1.00	Feb. 8, 1973	Carrier.
30. Chattanooga, Tenn.	1.00	Feb. 1, 1973	Airport authority.
31. Tyler, Tex.	2.00		

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